THE HIGH COURT

JUDICIAL REVIEW

2019 No. 222 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT

MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Appearances

James Devlin, SC, Oisin Collins and Margaret Heavey for the Applicant instructed by O'Connell Clarke Solicitors.

Niamh Hyland, SC and Suzanne Kingston for the Respondents instructed by the Chief State Solicitor.

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 July 2019.

SUMMARY

1. This judgment is delivered in respect of an application for an interlocutory injunction in the context of judicial review proceedings. The application is striking in its ambition. In contrast to most judicial review proceedings, wherein a stay is sought on the implementation of an impugned *administrative decision*, the interlocutory injunction sought in this case would restrain the operation of *legislative provisions*.

2. The Applicant contends that certain legislative amendments introduced by way of Ministerial Regulations in January 2019 are invalid. The legislative amendments affect the development consent regime which regulates peat extraction. The Applicant seeks to restrain the operation of these legislative amendments pending the determination of these judicial review proceedings. There is a heavy burden on an applicant who seeks, in effect, to suspend the operation of the law of the land. The jurisdiction to grant an injunction which would have the practical effect of preventing the operation of legislation pending the determination of proceedings is one which must be "most sparingly exercised". See *M.D. (An Infant) v. Ireland* [2009] IEHC 206; [2009] 3 I.R. 690.

3. The legislative amendments are attacked on a number of different grounds. Relevantly, the grounds of challenge include an allegation that the legislative amendments disapply existing domestic statutory provisions which are intended to ensure compliance with the requirements of the Environmental Impact Assessment Directive ("*the EIA Directive*") and the Habitats Directive. It is said that the effect of the legislative amendments is that the obligation to comply with the EIA Directive and the Habitats Directive is to be suspended for a temporary period in the case of certain peat extraction projects. This has been described by the Applicant as an "enforcement holiday" which is contrary to EU law. A letter from the EU Commission dated 29 April 2019, which expresses concerns about the further delay in the application of EIA Directive, has been exhibited.

4. The fact that the challenge is predicated upon EU law grounds has the consequence that the legal test for an interlocutory injunction requires that some consideration be given to the strength of the case. Specifically, it is appropriate to assess whether there is an arguable defence to the proceedings. See *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576, [100].

5. For the reasons set out herein, I have concluded that—in the highly unusual circumstances of the present case—a limited form of interlocutory injunction should be granted. By way of summary only, the principal reasons for this finding are as follows.

6. First, the grounds of challenge which are predicated upon an alleged breach of the EIA Directive and the Habitats Directive would appear to be very strong. The Ministerial Regulations purport to exempt, *with immediate effect*, large scale peat extraction projects from existing provisions of domestic legislation which implement the EIA Directive and the Habitats Directive. However, the replacement development consent procedure will not be fully in force for a significant period of time thereafter. The practical effect of this is that certain peat extraction activities—which require to be assessed for the purposes of the EIA Directive and might need to be assessed for the purposes of the Habitats Directive—may continue for a period of in excess of eighteen months without there being any obligation under *domestic law* to hold a development consent. Unlicensed peat extraction may thus be carried out without there being any risk of enforcement action. This appears *prima facie* to represent a breach of (i) the EIA Directive, and, in particular, article 2 and article 10A thereof, and (ii) article 6(3) of the Habitats Directive.

7. It cannot be said, at this interlocutory stage of the proceedings, that the State respondents have disclosed an arguable defence to these grounds of challenge. The written legal submissions on the interlocutory injunction application did not address the merits of the case at all, other than to concede that the Applicant has established an arguable case. The State respondents have not yet filed a substantive affidavit supporting their formal statement of opposition. The content of the anticipated affidavit, when filed, may well increase the prospects of a successful defence of the proceedings. On the basis of the evidence, materials and argument currently available, however, no insight has been offered by the State respondents as to how they intend to justify the wholesale exemption—albeit for a temporary period only—of large scale peat extraction projects from compliance with EU Directives which were to have been implemented by June 1988 and May 1994, respectively.

8. None of this is to say that the State respondents might not ultimately succeed at trial. The State respondents might well persuade the court at the full hearing that this temporary disapplication of the obligation to comply with the EIA Directive, three decades after the implementation date, is justified by reference to the "exceptional circumstances" of peat extraction. At this interlocutory stage, however, it is not obvious that there is an arguable defence to this aspect of the proceedings.

9. Secondly, the breach of EU environmental law alleged by the Applicant would—if well founded—represent an especially serious breach of the Irish State's obligations as a Member State of the European Union. On the Applicant's case, the Ministerial Regulations involve a retrograde step whereby *existing* domestic legislation, which properly transposes the EIA Directive and the Habitats Directive, is to be disapplied in the case of peat extraction. This will have the legal consequence that—during the transitional period—the Irish State's transposition of the EU environmental legislation will be less effective than that which had gone before.

10. Thirdly, if it were to transpire that the Applicant's complaints are well founded, then the refusal to grant an interlocutory injunction would have had the effect that unlicensed peat extraction would have been allowed to continue during the summer harvesting period in breach of the EIA Directive and the Habitats Directive. The absence of a requirement to obtain any development consent during this period could, in at least some instances, create a risk of harm to the environment.

11. Having regard to these three considerations, I am satisfied that the greatest risk of injustice lies in refusing to grant some form of an interlocutory injunction. The refusal of an injunction presents risks in terms of undermining the effectiveness of EU environmental law and of harm to the environment. On the other side of the scales, the factors relied upon by the State respondents are largely administrative in nature. (See paragraph 92 *et seq*. below).

12. For the reasons set out at paragraph 115 below, I propose to confine the terms of the interlocutory injunction to one restraining the implementation of the Planning and Development (Exempted Development) Regulations 2019.

13. The grant of an interlocutory injunction which has the effect of suspending the operation of legislation—even secondary legislation, as in this case—is highly unusual. It would be undesirable if such an interlocutory injunction were to remain in place for a lengthy period of time. I propose, therefore, to list these proceedings for full hearing in the first week of September. To this end, I will hear counsel on an appropriate timetable for the exchange of affidavits and written legal submissions.

STRUCTURE OF THIS JUDGMENT

14. It is often helpful in determining an application for an interlocutory injunction to identify the precise legal effect of the impugned measure by considering the position as it stood prior to the measure ("*status quo ante*"), and the position subsequent to the measure. This exercise is much more complicated in a case, such as the present one, which involves a challenge not to a single administrative decision, but to a series of legislative amendments. It will be necessary to explain the existing development consent regime governing peat extraction in some detail, i.e. the *status quo ante*, before going on to identify the legal position obtaining *subsequent* to the adoption of the impugned Ministerial Regulations.

15. In an attempt to make this judgment more readable, it is proposed to divide it into three parts as follows. The first part will consist of an overview of the legislative regime both pre- and post- January 2019, i.e. the date upon which the Ministerial Regulations became operative. The second part will address the legal test governing an application for an interlocutory injunction, and, in particular, will address the special considerations that arise in circumstances where it is sought to enjoin the operation of legislative measures. The third and final part will entail a detailed discussion of the issues, and conclude with the court's decision.

Part 1

The legislative framework pre- and post- January 2019

OVERVIEW OF THE MINISTERIAL REGULATIONS

16. These judicial review proceedings seek to set aside two statutory instruments made in January 2019, namely (i) the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019), and (ii) the Planning and Development Act 2000 (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019). For ease of exposition, I will refer to these two statutory instruments collectively as "*the Ministerial Regulations*".

17. The ultimate ambition of the Ministerial Regulations is that peat extraction which requires assessment for the purposes of the EIA Directive will be subject to a single development consent to be issued by a single competent authority, namely the Environmental Protection Agency ("*the EPA*"). The new regime is to apply to the extraction of peat that involves an area of 30 hectares or more.

18. This represents a significant change from the pre-January 2019 legislative regime whereby peat extraction had, generally, been regulated under the Planning and Development Act 2000 ("*the PDA 2000*"). (There had been a parallel obligation to obtain an integrated pollution control licence from the EPA in the case of the extraction of peat in the course of business which involves an area exceeding 50 hectares. See paragraph 40 below).

19. The first in time of the two Ministerial Regulations has been made pursuant to section 3 of the European Communities Act 1972. The first set of regulations purports to introduce a series of amendments to *primary* legislation, namely the Environmental Protection Agency Act 1992. It also purports to make a single amendment to the PDA 2000. One of the issues which falls for determination in the judicial review proceedings is whether the use of secondary legislation to amend primary legislation is justified on the basis that the content of the regulations is "necessitated by the obligations of membership of the European Union" for the purposes of Article 29.4.6° of the Constitution of Ireland.

20. The second in time of the two Ministerial Regulations has been made pursuant to section 4(4A) of the PDA 2000 as follows.

> "(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—
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> (a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and
>
> (b) as respects which an environmental impact assessment or an appropriate assessment is required,
>
> to be exempted development."

21. The Minister for Housing, Planning and Local Government has prescribed the following class of development for this purpose.

> "8H.(1) Peat extraction within the meaning of the Act of 1992 shall be exempted development.

(2) Development necessary to enable compliance with a condition attached to a licence or revised licence under Part IV of the Act of 1992 to carry on peat extraction referred to in paragraph (1) shall be exempted development.

(3) In this article 'Act of 1992' means the Environmental Protection Agency Act 1992 (No. 7 of 1992)."

22. The fact that the same definition of "peat extraction" is used in both the amended Environmental Protection Agency Act 1992 and the Ministerial Regulations has the effect that the extraction of peat that involves an area of 30 hectares or more (i) is immediately exempt from the requirement to obtain planning permission; and (ii) will ultimately be subject to licensing by the EPA.

23. There must be a question mark as to whether the exemption carved out for peat extraction goes beyond that which is allowed for by section 4(4A) of the PDA 2000. That section allows the Minister to exempt development from the planning legislation where the development is authorised, or required to be authorised by or under any statute (other than the PDA 2000). Section 4(4A) thus allows for an exemption where there is an alternative authorisation procedure in place which will ensure compliance with the EIA Directive and the Habitats Directive. Whereas peat extraction involving an area of more than 30 hectares will, in the fullness of time, be subject to licensing and assessment under the Environmental Protection Agency Act 1992, this will not occur for a period of at least eighteen months in the case of unlicensed activities, and thirty-six months in the case of licensed activities. It is at least arguable that section 4(4A) may not be invoked until the alternative authorisation procedure is operative.

24. Much emphasis had been placed in the written legal submissions and at the hearing before me by counsel for the State respondents on the perceived benefits of the proposed licensing regime. In particular, the current position whereby, in principle at least, a developer might be required to obtain two separate consents from the EPA and An Bord Pleanála, respectively, would be avoided. Conversely, counsel for the Applicant sought to criticise certain aspects of the proposed licensing regime. It was said, for example, that there is no procedure whereby a member of the public can seek to enforce breaches of the Environmental Protection Agency Act 1992.

25. These are all matters which will have to be determined at the full hearing of the judicial review proceedings. The question of whether the proposed licensing regime—once it comes into full force and effect—would fulfil the requirements of the EIA Directive and the Habitats Directive is very much of secondary importance in the context of this application for an interlocutory injunction. The *immediate* effect of the Ministerial Regulations is to disapply the existing development consent regime under the planning legislation. Thereafter, there is to be a transitional period of in excess of eighteen months in the case of unlicensed peat extraction, and in excess of thirty-six months in the case of licensed peat extraction, whereby there will be no requirement to obtain a development consent of any sort in respect of the extraction of peat that involves an area of 30 hectares or more.

26. The transitional provisions thus give rise to a lacuna in the governance of peat extraction whereby the existing legislative regime under the PDA 2000 is disapplied, notwithstanding that the new licensing regime has not yet come into full force and effect.

PEAT EXTRACTION AND PLANNING LEGISLATION

27. To assist the reader in understanding the legal effect of the Ministerial Regulations, it is necessary first to say something about the regulatory controls governing peat extraction under domestic law.

28. Peat extraction had traditionally been free from control under the planning legislation. Section 4 of the Local Government (Planning & Development) Act 1963 had provided that development consisting of the use of any land for the purposes of "agriculture" was exempt from the requirement to obtain planning permission. The definition of "agriculture" included the use of land for turbary.

29. It was necessary to amend domestic law in order to give effect to the original version of the EIA Directive, Directive 85/337/EC. (As noted earlier, the deadline for implementation of this version of the EIA Directive had been 27 June 1988). The benefit of "exempted development" under section 4 of the Local Government (Planning & Development) Act 1963 was disapplied in the case of "peat extraction which would involve a new or extended area of 50 hectares or more". See Local Government (Planning & Development) Regulations 1990. The carrying out of an environmental impact assessment was mandatory for peat extraction on this scale. See EC (Environmental Impact Assessment) Regulations 1989.

30. The 50 hectares threshold was subsequently criticised in Case C 392/96 *Commission v. Ireland*. Following on from the judgment of the CJEU in that case, the thresholds for peat extraction were revised downwards. The threshold for exempted development was reduced to 10 hectares, and the threshold for a mandatory environmental impact assessment was reduced to 30 hectares. (The definition of "agriculture" under the PDA 2000 omits any reference to turbary). The exempted development threshold was subsequently qualified by the Planning and Development Regulations 2005, and the Planning and Development (Amendment) (No. 2) Regulations 2011.

31. One of the curious features of the approach initially taken to peat extraction under domestic legislation is that a distinction had been drawn between existing peat extraction, and peat extraction involving "new or extended" areas. Although not stated in express terms, the implication of the legislation seems to have been that existing peat extraction did not have to comply with the EIA Directive. In order to benefit from this special treatment under domestic law, all that was necessary was that the drainage of the bogland had commenced prior to the coming into force of the relevant parts of the Planning and Development Regulations 2001 on 21 January 2002. (See Planning and Development Regulations 2005). Thus, it was not necessary even that the peat extraction had commenced prior to the implementation date for the EIA Directive on 27 June 1988.

32. The generous treatment afforded to peat extraction under domestic law has since been rolled back by amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 as follows.

(i) Benefit of exempted development disapplied

33. It is now provided that development shall not be exempted development under the Planning and Development Regulations if an environmental impact assessment for the purposes of the EIA Directive or an appropriate assessment for the purposes of the Habitats Directive is required. See section 4(4) of the PDA 2000. Under the transitional provisions, the loss of the benefit of exempted development does not apply where the development is completed not later than twelve months after the date of the commencement of the legislative amendment. Put otherwise, developers were allowed a further period of grace until 21 September 2012 during which they could either "complete" their development or apply for planning permission. From that date forward, any development—including peat extraction—which required environmental impact assessment or appropriate assessment was subject to a requirement to obtain planning permission.

34. The implications of this change in the law for peat extraction have been considered in detail by the High Court (Meenan J.) in *Bulrush Horticulture Ltd. v. An Bord Pleanála (No. 1)* [2018] IEHC 58. Those proceedings came before the High Court by way of an

application for judicial review of a declaration made by An Bord Pleanála pursuant to section 5 of the PDA 2000. The Board had ruled that the development involved in continued works to extract peat from a site in County Westmeath required both an environmental impact assessment and an appropriate assessment. The peat extraction thus lost the benefit of exempted development which it had previously enjoyed under the Planning and Development Regulations.

35. The developer sought to challenge An Bord Pleanála's declaration. One of the grounds of challenge had been that the Board, in finding that the EIA Directive applied to peat extraction which had allegedly commenced prior to the coming into force of domestic legislation which gave effect to the EIA Directive, had erred in law. It was contended that the requirement for an EIA only arose in the context of development which involved a "new or extended" area. The developers relied in support of this argument on case law of the CJEU to the effect that where a consent application had been pending before a competent authority *prior* to the coming into force of the EIA Directive, then the consent application was not subject to the EIA Directive. This argument was rejected as follows by the High Court.

> "41. Both Bulrush and Westland relied upon a number of decisions of the European Court of Justice in support of their submission that neither an Environmental Impact Assessment nor an appropriate assessment was required. These decisions included *Commission v. Germany*, Case C 431/92, *Burgemeester v. Gedeputeerde Staaten Noord Holland,* Case C-81/96, the *Commission v. Austria* Case C 209-04 and *Stadt Penburg v. Germany*, Case C-2206-08. These cases are generally referred to as the 'Pipeline Cases'. The principles distilled from these decisions are illustrated in *Stadt Papenburg v. Bundesrepublik Deutschland*, Case C-226/08. In this case, a local authority (Stadt Papenburg) issued consent to a shipyard to carry out dredging of the River Ems to allow access from a shipyard to the sea in 1994. This decision had the effect of granting permission for future dredging operations. In 2006 the German government indicated that parts of the River Ems situated down river could be accepted as a possible site of community interest within the meaning of the "Habitats Directive". The local authority brought legal proceedings seeking to prevent the defendant giving its agreement to the inclusion of part of the River in a list of sites of community interest. The local authority was concerned that if parts of the river were included in the list, the dredging operations required for the shipyard would in the future and in every case thereafter have to undergo an Appropriate Assessment as required by the Habitats Directive.
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> 42. The European Court of Justice held that if the dredging works could be considered as constituting a single operation then the works could be considered to be one and the same project for the purposes of Article 6 of the Habitats Directive. In that case, the project had been authorised before the expiry of the time limit for transposition of the Habitats Directive and, as such, was not subject to the requirement for an Appropriate Assessment under the said Directive.
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> 43. In my opinion, the decision in *Stadt Papenburg* and other 'Pipeline Cases' are of no assistance to Bulrush or Westland. These cases cover situations were permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither Bulrush nor Westland had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both Bulrush and Westland that they are, in effect, 'Pipeline Projects' is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective."

36. The High Court also confirmed that the amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 did not have an impermissible retrospective effect.

37. The High Court subsequently refused leave to appeal to the Court of Appeal, holding that one of principal requirements for certifying leave to appeal, i.e. that the law in question stands in a state of uncertainty, had not been met. See *Bulrush Horticultural Ltd. v. An Bord Pleanála (No. 2)* [2018] IEHC 808.

(ii) No time-limit on enforcement proceedings

38. The restrictions on the availability of the benefit of exempted development (discussed above) introduced under the Environment (Miscellaneous Provisions) Act 2011 had been complemented by another amendment under that Act. More specifically, the time-limits governing the taking of enforcement action in respect of unauthorised peat extraction were amended. The general position under the PDA 2000 is that there is a seven-year time-limit on the taking of enforcement proceedings. In the case of development in respect of which no planning permission has been obtained, the seven-year time-limit generally runs from the date upon which the unauthorised development first commenced. This seven-year time-limit is, however, modified in the case of peat extraction. An application may be made at any time for an order directing the *cessation* of unauthorised peat extraction development. (A seven-year time-limit continues to apply to mandatory orders requiring the reinstatement of lands). A similar time-limit applies to quarrying activities. See, generally, *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [86].

Primary v. Secondary legislation

39. As an aside, it should be noted that the two legislative amendments discussed above had been introduced by way of primary legislation, i.e. the Environment (Miscellaneous Provisions) Act 2011. The purported effect of the Ministerial Regulations is to introduce an entirely different legislative regime for certain categories of peat extraction. The Applicant contends that the use of secondary legislation to amend primary legislation breaches Article 15.2.1° of the Constitution of Ireland.

IPC LICENSING REGIME: POSITION PRIOR TO JANUARY 2019

40. The legal position, prior to the adoption of the Ministerial Regulations in January 2019, had been that certain large-scale peat extraction was subject to licensing by the EPA under Part IV of the Environmental Protection Agency Act 1992. The licensing regime had existed in parallel to the requirement to obtain planning permission.

41. The relevant threshold for the purposes of a licence application had read as follows.

> "1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares."

42. This threshold represented the gateway to the licensing regime. The EPA did not have jurisdiction to entertain a licence application unless this threshold has been exceeded. Once a licence application had been made, the EPA then had jurisdiction to screen the application for the purposes of the EIA Directive and the Habitats Directive. Unless and until the threshold of 50 hectares had been exceeded, however, the EPA had no jurisdiction to entertain a licence application. Thus, in the hypothetical case of an existing peat extraction development which fell below the threshold of 50 hectares, a licence application to the EPA would not have been required even if a screening determination *would* have indicated that the proposed development was likely to have a significant effect on the environment and/or a European Site, and, consequently, would have triggered a requirement for assessment as a matter

of EU law.

43. Put shortly, those projects which had required an IPC licence under domestic law pre- January 2019 had represented merely a subset of those which require assessment for the purposes of the EIA Directive and the Habitats Directive.

44. The application of this threshold had proved difficult in practice. See, for example, the judgment of the High Court (Barrett J.) in *Environmental Protection Agency v. Harte Peat Ltd.* [2014] IEHC 308; [2015] 1 I.R. 462.

***STATUS QUO ANTE*: LEGISLATIVE REGIME PRE-JANUARY 2019**

45. The legal position in respect of peat extraction prior to the operative date of the Ministerial Regulations in January 2019 can thus be summarised as follows.

> (i). There was an obligation to obtain planning permission in respect of any peat extraction project which requires assessment under either the EIA Directive or the Habitats Directive. An EIA had been mandatory, under domestic law, where the peat extraction would involve a "new or extended" area of 30 hectares or more. See Planning and Development Regulations, Schedule 5, Part 2, paragraph 2(a). In the case of sub threshold development, a screening determination would have to be made by reference to the detailed criteria set out at Schedule 7 of the Planning and Development Regulations. A screening determination for the purposes of article 6(3) of the Habitats Directive would also have to be undertaken.
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> (ii). Peat extraction which was being carried without the benefit of planning permission, where required, was vulnerable to enforcement proceedings. Any person is entitled to apply for orders pursuant to section 160 of the PDA 2000. There is no time limit on an order which requires the cessation of peat extraction. A planning authority is empowered to serve an enforcement notice and/or to apply for orders pursuant to section 160 of the PDA 2000. Where a complaint is made and (i) a planning authority establishes, following an investigation, that unauthorised development (other than development that is of a trivial or minor nature) is being carried out, and (ii) the person who has carried out or is carrying out the development has not proceeded to remedy the position, then the authority is *obliged* to issue an enforcement notice and/or make an application pursuant to section 160 unless there are compelling reasons for not doing so. See section 153(7) of the PDA 2000 (as inserted by the Environment (Miscellaneous Provisions) Act 2011).
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> (iii). Section 5 of the PDA 2000 provides a simple procedure whereby the question of whether a particular development (including peat extraction) requires planning permission can be determined, initially, by the planning authority and, thereafter, on review by An Bord Pleanála. By way of example, the proceedings in *Bulrush Horticultural Ltd. v. An Bord Pleanála* (discussed at paragraph 34 above) arose out of a section 5 reference made by An Bord Pleanála in respect of peat extraction. A section 5 declaration, which has not been challenged by way of judicial review, can be relied upon to ground enforcement proceedings. See *Killross Properties Ltd v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541.
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> (iv). In the event that a developer carrying out peat extraction wished to regularise the planning status of the activity—for example, in response to the threat of enforcement proceedings—then the substitute consent procedure under Part XA of the PDA 2000 would have to be invoked. Relevantly, there is no automatic entitlement to apply for substitute consent; rather, a developer has to apply first to An Bord Pleanála for leave to make an application for substitute consent. The Board may only grant leave to apply if it is satisfied that "exceptional circumstances" exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.
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> (v). In parallel to the planning legislation, certain large-scale peat extraction involving an area in excess of 50 hectares was subject to licensing by the EPA under Part IV of the Environmental Protection Agency Act 1992.

LEGISLATIVE REGIME POST-JANUARY 2019

46. The operative date of the Ministerial Regulations is 25 January 2019. The legislative regime post-January 2019 can be summarised as follows.

> (i). Peat extraction that involves an area of 30 hectares or more is immediately exempt from the requirement to obtain planning permission. This has the consequence that the enforcement mechanisms under the PDA 2000; the section 5 reference procedure; and the substitute consent procedure, all no longer apply.
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> (ii). Peat extraction which falls short of the threshold of 30 hectares is, in principle, subject to a requirement to obtain planning permission. It should be noted, however, that peat extraction in a "new or extended" area of less than 10 hectares is exempted development, subject always to section 4(4) of the PDA 2000.
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> (iii). Peat extraction that involves an area of 30 hectares or more requires an IPC licence from the EPA. Under the transitional provisions, however, an unlicensed operator is entitled to continue to carry on peat extraction. This is subject to a requirement to make a licence application not later than eighteen months after 25 January 2019. Provided a licence application is made within time, the peat extraction can then continue until such time as the licence application is determined. If the licence application is refused, and that refusal is challenged by the operator in judicial review proceedings, then peat extraction can continue until such time as the judicial review is determined by a final judgment. See section 82B(7) of the Environmental Protection Agency Act 1992 (as inserted by the Ministerial Regulations).

Part 2

Application for interlocutory injunction

THE LEGAL TEST

47. The parties were in broad agreement as to the legal test governing an application for an interlocutory injunction in judicial review proceedings. Both parties cited the judgment of the Supreme Court in *Okunade v. Minister for Justice and Equality* [2012] IESC 49; [2012] 3 I.R. 152 at [104].

"As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:–

(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) the court should consider where the greatest risk of injustice would lie.

But in doing so the court should:–

(i) give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

48. The State respondents conceded, for the purposes of the interlocutory injunction application only, that the Applicant has met the threshold of an arguable case. (See paragraph 41 of the affidavit of Terry Dunne of 18 June 2019). Both parties accepted that damages would not be an adequate remedy for either side.

49. The parties were also in agreement that the courts have jurisdiction to grant an interlocutory injunction suspending the operation of a legislative provision. This jurisdiction had been expressly recognised by the Supreme Court in *Pesca Valentia Ltd. v. Minister for Fisheries & Forestry* [1985] I.R. 193.

50. It is also a necessary incident of EU law: see Case C 213/89 *Factortame* [1990] E.C.R. I 02433.

"Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with the requirements inherent in the very nature of Community law .

The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."

51. Counsel for the State emphasised, however, that a heavy burden lies on an applicant who seeks to have the operation of legislative provisions suspended by way of an interlocutory injunction. I will return to consider this submission in more detail at paragraph 93 below.

52. The Applicant submits that the principles laid down in *Okunade* must now be read in conjunction with those set out by the Supreme Court in its judgment in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576 ("*Dowling*"). The Supreme Court in Dowling had to consider whether the principles in *Okunade* represented the appropriate test by reference to which an interlocutory injunction application should be determined in circumstances where the proceedings allege a breach of EU law. The Supreme Court, *per* Clarke J. (as he then was), conducted a careful review of the case law of the CJEU in respect of the legal test governing applications for interim measures. The Supreme Court emphasised the distinction drawn by the CJEU between cases where there is a challenge to the validity of domestic legislation, and those where there is a challenge to the validity of the underlying EU legislation. The procedural rules governing cases in the former category are a matter within the procedural autonomy of the Member State, subject always to the principles of equivalence and effectiveness. Clarke J. suggested that the judgments in respect of the latter category of cases were nevertheless of some relevance to a challenge to domestic legislation, in that the legal test in those cases must be taken to amount to the provision of an effective remedy.

"[87] Notwithstanding those differences, it does not seem to this court that the test identified by the ECJ in *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollampt Paderborn* (Joined Cases C-143/88 & C-92/89)[1991] E.C.R. I-415 is irrelevant to the court's consideration. It could hardly be suggested that, in formulating the test by reference to which national courts should act in circumstances such as those which arose in *Zuckerfabrik*, the ECJ was formulating a test, which did not provide persons with an effective remedy for those European Union law rights which were said to have been breached by the adoption of an allegedly invalid European Union measure. It necessarily follows that the test identified in *Zuckerfabrik* must be taken to amount to the provision of an effective remedy. While a national court, in a case such as this, is required to apply national procedural law subject to those rules providing an effective remedy, it follows that a national court can have regard to the *Zuckerfabrik* test in assessing whether an effective remedy at an interim or interlocutory stage is available.

[88] In those circumstances, it seems to the court that, in considering whether, at an interim or an interlocutory stage, to restrain action said to be justified by a national measure whose validity is challenged on the basis of European Union law, this court should apply the test in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152 but should also have regard to the question of whether it can properly be said that a party might be deprived of an effective remedy by

the court's decision. In assessing the later question, the court should have regard to *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollampt Paderborn* (Joined Cases C-143/88 & C-92/89) [1991] E.C.R. I-415 and allied case law."

53. Clarke J. then embarked upon the exercise of comparing the *Okunade* principles with the legal test applicable to a challenge to the validity of EU legislation, and concluded that in many respects the *Okunade* principles were more generous to an applicant. For example, it was suggested that Irish national rules may afford greater protection by requiring a person to establish a breach of their European Union rights to a lower standard ("arguable case") than that required in a challenge to EU legislation (the court must "entertain serious doubts" about the validity of the measure).

54. By way of conclusion, Clarke J. then summarised the position as follows.

> "[100] It follows that it was necessary to examine the potential consequences of whether there would be irreparable damage by the grant or refusal of the interlocutory injunction and if there be the risk of irreparable damage in both cases, how the court is to balance the competing rights involved or to assess the 'balance of interests' as the ECJ described it in *Le Pen v. Parliament (Case C-208/03 P-R)* [2003] E.C.R. I-7939. However, in order for that question to arise it was necessary first to examine whether there is an arguable case for the Minister's defence of these proceedings. If there were not such an arguable defence and if, at least on the basis of the evidence, materials and argument currently available, it seemed clear that the appellants would succeed, then the court's obligations in order to provide an effective remedy in those circumstances might well be different. The court, therefore, turns first to the Minister's defence."

55. The judgment in *Dowling* thus appears to introduce a gloss to the *Okunade* principles insofar as it indicates that some limited assessment should be made of the strength of the *defence* to the proceedings, i.e. the court must be satisfied that there is an arguable defence. This gloss is consistent with the statement of principle at sub paragraph [104] (d) of *Okunade*. This statement indicates that the court can place "all due weight" on the strength or weakness of the applicant's case in judicial review proceedings which do not involve detailed investigation of fact or complex questions of law. Both statements of principle indicate that it will be legitimate in some cases to engage with the merits of the proceedings beyond simply confirming that an applicant has established an arguable case.

56. Finally, counsel for the State respondents very helpfully referred me to the approach with the CJEU itself takes to interim measures in the context of infringement proceedings. Counsel opened the judgment in Case C 441/17 R Com*mission v. Poland (Bia³owie¿a Forest)*. The CJEU emphasised the limitations on the ability of a court hearing an application for interim measures to reach findings of fact. The CJEU suggested that a court hearing an application for interim relief cannot make findings of fact but should postulate, solely for the purpose of the assessment of the existence of serious and irreparable damage, that the complaints put forward in the main proceedings by the applicant for interim measures might be upheld.

> "54. In that regard, in the context of the assessment of urgency, the Court recalls that the procedure for interim relief is not designed to establish the truth of complex facts that are very much in dispute. The Court hearing an application for interim measures does not have the means necessary in order to carry out such examinations and in numerous instances it would be difficult for it to manage to do so in good time (orders of the President of the Court of 24 April 2008, *Commission v Malta*, C-76/08 R, not published, EU:C:2008:252, paragraph 36, and of 10 December 2009, *Commission v Italy,* C573/08 R, not published, EU:C:2009:775, paragraph 22).
>
> 55. It must also be pointed out that the Court hearing an application for interim measures must postulate, solely for the purpose of the assessment of the existence of serious and irreparable damage, that the complaints put forward in the main proceedings by the applicant for interim measures might be upheld. The serious and irreparable damage whose likely occurrence must be proven is that which would result, where relevant, from the refusal to grant an application for interim measures in the event that the action in the main proceedings was subsequently successful, and it must therefore be assessed on the basis of that premiss, although that does not mean that the Court hearing the application for interim relief takes a position on whether the complaints put forward are well founded (see, to that effect, orders of the Vice-President of the Court of 19 December 2013, *Commission v Germany,* C426/13 P(R), EU:C:2013:848, paragraphs 51 and 52, and of 14 January 2016, *AGC Glass Europe and Others v Commission*, C517/15 P-R, EU:C:2016:21, paragraph 30)."

57. I will return to consider this judgment at paragraph 109 below in the context of the assessment of the alleged risk of harm to the environment.

Article 11 of the EIA Directive

58. For the sake of completeness, it should be noted that the EIA Directive itself obliges Member States to provide a "review procedure" whereby members of the public concerned and environmental non-governmental organisations may challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive.

59. The equivalent provision under the Integrated Pollution Prevention and Control Directive (Directive 96/61/EC) has been interpreted as entailing a right to apply for interlocutory measures. See Case C 416/10 *Krizan*, as follows.

> "109. However, exercise of the right to bring an action provided for by Article 15a of Directive 96/61 would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit.
>
> 110. In the light of the foregoing, the answer to the fourth question is that Article 15a of Directive 96/61 must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that directive, pending the final decision."

PRESUMPTION OF CONSTITUTIONALITY

60. Before turning to apply the legal principles governing an application for an interlocutory injunction to the facts of the present case, it is necessary first to say something about the presumption of constitutionality which applies to legislation enacted by the Oireachtas.

61. The relevance of the presumption of constitutionality to an application for an interlocutory injunction seeking to restrain the operation of primary legislation was explained as follows by Finlay C.J. in *Pesca Valentia Ltd. v. Minister for Fisheries & Forestry* [1985] I.R. 193 at 201.

> "I am, therefore, satisfied that the presumption of constitutional validity which applies to the Fisheries (Amendment) Act, 1983, expressly authorising the insertion of this condition in these licences is material in relation to the determination by the Court as to whether the plaintiff has established a fair question to be tried at the hearing of his action. I am also satisfied that the consequence arising from the making of an interlocutory injunction of preventing the Executive from carrying out powers vested in them by a statute enjoying that presumption and, in particular, the consequence of postponing the bringing to trial of a criminal offence created by such a statute, is a matter for consideration on the balance of convenience. I am not, however, satisfied that there is any special principle applicable to an application for an interlocutory injunction of this kind."

62. The subsequent case law, which emphasises that the jurisdiction to restrain the operation of legislation by way of interlocutory injunction should be exercised most sparingly, appears to be informed, in part at least, by the presumption of constitutionality. See, for example, *M.D. (An Infant) v. Ireland* [2009] IEHC 206; [2009] 3 I.R. 690, [17].

> "Counsel for the defendants accepted that this court has a jurisdiction, at the level of principle, to grant an injunction which would have the practical effect of preventing the operation of a statute pending the determination by the court of proceedings in which the validity of the statute concerned was under challenge. That this is so is clear from the decision in *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] I.R. 193. That being said it was argued, correctly in my view, that the relevant jurisdiction is one which must be most sparingly exercised. The reasons for this are obvious. *Legislation which has been passed into law by the Oireachtas enjoys a presumption of constitutionality*.* If it were to be the case that persons who were able to establish a fair case to be tried concerning the validity of the relevant legislation having regard to the provisions of the Constitution (which is not a particularly high threshold) were able to obtain an injunction preventing, in practice, the application of the legislation to them until the proceedings had been determined, then it would follow that legislation could, in practice, be sterilised pending a final determination of the constitutional issues raised. Those considerations apply with equal force where the statute concerned is one which creates a criminal offence."
>
> *Emphasis (italics) added.

63. There was some debate at the hearing before me as to whether the presumption of constitutionality applies to secondary or delegated legislation such as the Ministerial Regulations. The presumption of constitutionality is an incident of the separation of powers, and derives from the respect which one great organ of the State, the Courts, owes to another, the Oireachtas. This rationale does not apply to delegated legislation which is made, not by the Oireachtas, but by a *persona designata*.

64. Counsel for the State accepted that the presumption does not apply to delegated legislation (citing *State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201), but submitted that a similar result arises from the principle identified at paragraph [92] in *Okunade* that Ministers are entitled to exercise powers lawfully conferred upon them by the Oireachtas (see page 189 of the reported judgment in *Okunade*).

65. The Applicant has, however, identified a more fundamental reason as to why the presumption of constitutionality cannot apply. The first in time of the two Ministerial Regulations, i.e. the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019, purports to introduce a series of amendments to *primary* legislation, namely the Environmental Protection Agency Act 1992 and the PDA 2000. The use of secondary legislation to amend primary legislation would be appear *prima facie* to represent a breach of Article 15.2.1° of the Constitution of Ireland. The validity of the regulations depends on whether same can avail of the shield from constitutional challenge provided for by Article 29.4.6° of the Constitution of Ireland, i.e. whether the legislative measures can be said to be "necessitated by the obligations of membership of the European Union".

66. Whereas the validity of the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 may ultimately be upheld on this basis, it can hardly be said that secondary legislation—the very validity of which is dependent on the exception provided for under Article 29.4.6°—could attract a presumption of constitutionality. Rather, the position is analogous to that stated by McCarthy J. in his judgment in *Pesca Valentia Ltd. v. Minister for Fisheries & Forestry* [1985] IR 193 at 204.

> "[…] As I understood the argument on behalf of the Minister, the existence of a fair question to be tried on the Community law issue was not in question; indeed I fail to see how it could be questioned. The constitutional presumption, in my view, is irrelevant to these considerations, since the Constitution itself envisages at least some freedom from constitutional scrutiny of 'laws enacted, acts done or measures adopted by the Communities, or institutions thereof', as to having the force of law in the State, (Article 29.4.3). Such a shield from constitutional scrutiny can scarcely carry the presumption of constitutional validity attaching to the legislation of the Oireachtas."

Part 3

Discussion and Decision

OVERVIEW

67. The overriding objective in ruling upon an application for an interlocutory injunction is to seek to ensure justice between the parties pending a full hearing and determination of the judicial review proceedings. There will almost always be a significant lapse of time between the institution of proceedings and the determination of same. This is a function of the fact that parties need time to prepare for litigation, and that there is constant pressure on the courts' lists. This is so even in the circumstances of the present case: notwithstanding that these proceedings had been afforded priority, the paperwork required for a full hearing has not yet been completed by the parties, and a period of almost five months will have elapsed between the date of the institution of the proceedings and the hearing scheduled for the first week in September.

68. The practical solution which is put in place for urgent cases is to schedule a short interlocutory hearing in early course, whereat the moving party can seek temporary orders pending the ultimate determination of the proceedings. The courts' lists can

accommodate a short hearing more readily than a longer hearing. On the facts of the present case, for example, the interlocutory application took half a day, whereas the full hearing is likely to take three to four days. It was possible to fix an early hearing for the interlocutory injunction application which took place in Cork on 15 July 2019.

69. There are inherent limitations to an interlocutory hearing as compared to the full trial. The shortness of the hearing time; the fact that the pleadings will not normally be closed; and the absence of oral evidence, will almost always mean that the judge ruling on the interlocutory application will not have as full an appreciation of the case as will the trial judge when the case ultimately comes on for full hearing. It is precisely because of these inherent limitations that the courts have devised a specific test for interlocutory injunction applications. In judicial review proceedings where damages are not an adequate remedy, the test focuses on deciding where the greatest risk of injustice lies, rather than on the underlying merits of the proceedings. In most instances, the consideration of the merits of the case will be confined to confirming that there is an arguable case. Valuable time at the short hearing is not taken up unnecessarily with submissions on the substantive issues in the case.

70. In some instances, however, it may be appropriate to go further and to assess the strength of the underlying merits of the case. The Supreme Court in Okunade at paragraph [95] recognised that "*there may be greater scope, in the context of judicial review proceedings, for the court to take into account the strength of the case, as it appears on the occasion of the application for a stay or injunction, than may apply in an ordinary injunction case.*"

71. The rationale for this distinction was expanded upon as follows.

> "[97] It is well worth recalling that Lord Diplock spoke of the court refraining from deciding questions of disputed fact or 'difficult' questions of law. In the context of an application for an interlocutory injunction in the commercial, contractual, property or allied fields the wisdom of those remarks is obvious. If it were to be otherwise then the problems referred to earlier, as noted in *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549, would loom large. However, those considerations may be of significantly less weight in judicial review applications. First, it is rarely the case that questions of fact as such are an issue in judicial review proceedings. Even if the decision maker had to decide facts, then the only question which can arise before the court in a judicial review challenge to the decision in question is as to whether the decision maker could rationally (in the sense in which that term is used in the jurisprudence) have come to the conclusion of fact concerned. On that question the only matters that the court ordinarily needs to consider are the materials which were before the relevant decision maker.
>
> [98] In addition, while there may well be some judicial review proceedings which could come within the parameters of what Lord Diplock spoke of as 'difficult' questions of law, many such cases involve either very net questions of law or involve the application of well established principles to the circumstances of the case. It seems to me, therefore, that in considering whether to grant a stay or injunction pending the progress of judicial review proceedings, the court can have regard to the strength of the case at least where, as will frequently be the case, the challenge does not involve issues of fact as such or the sort of complex questions of law which, in the words of Lord Diplock, at p. 407 'call for detailed argument and mature considerations'."

72. These principles have been included as part of the overall structured test set out at paragraph [104] of the judgment in *Okunade* (at sub-paragraph (d)). (See paragraph 47 above).

73. This approach seems particularly apt where—as in the present case—the grounds of challenge are largely predicated upon alleged breaches of EU law. As discussed earlier, the judgment of the Supreme Court in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576 suggests that the principle of effectiveness requires that a court hearing an interlocutory injunction application must consider whether an arguable *defence* to the proceedings is disclosed. (See paragraph 52 et seq. above).

74. The State respondents have conceded that the Applicant has passed the threshold for the purposes of an interlocutory injunction, i.e. an arguable case. This concession is pragmatic, and is helpful insofar as it goes. As discussed above, however, the assessment which a court is required to undertake in accordance with the principles identified by the Supreme Court in *Dowling* is more exacting. The court must consider whether there is an arguable defence. Moreover, for the reasons explained below, it has been possible—even allowing for the inherent limitations of an interlocutory hearing—to make some assessment of the strength of one of the principal grounds of challenge advanced by the Applicant in this case. In particular, there are a number of features of the EIA Directive itself and of the case law of the CJEU which appear to be supportive of the Applicant's case.

IS THERE AN ARGUABLE DEFENCE?

Discussion

75. The gravamen of the Applicant's case in respect of the EIA Directive is that it is not lawful for a Member State to dispense with the obligation to comply with the EIA Directive, even on a temporary basis. The Applicant contends that the legal effect of the transitional provisions under the Ministerial Regulations is that unlicensed peat extraction, which should have been subject to assessment for the purposes of the EIA Directive, is to be permitted to continue for a period of in excess of eighteen months. This is said to represent a "flagrant breach" of the EIA Directive. Counsel points out that the deadline for the implementation of the EIA Directive had expired more than 31 years ago, i.e. on 27 June 1988.

76. There are a number of aspects of the EIA Directive which appear to be supportive of this argument, as follows.

> (i). The EIA Directive imposes a requirement to apply for and obtain development consent *prior* to the commencement of development. Unless a developer has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, they cannot commence the works relating to the project in question. (Case C 215/06 *Commission v. Ireland*, [51]).
>
> (ii). It is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects. (Case C 215/06 *Commission v. Ireland*, [51]).
>
> (iii). A Member State is required under article 10A of the EIA Directive to apply effective, proportionate and dissuasive penalties to infringements of the national provisions adopted pursuant to the EIA Directive.
>
> (iv). The CJEU has held that certain provisions of the EIA Directive have "direct effect". (See, for example, Case C 244/12

Salzburger Flughafen, [48]). This indicates that certain of the key provisions of the EIA Directive can be relied upon even in the absence of domestic legislation which properly implements the Directive. Moreover, an environmental non-governmental organisation ("ENGO"), such as the Applicant, is entitled under article 11 to access to a "review procedure" to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive.

(v). Rules for the regularisation of projects which have been carried out in breach of the EIA Directive must not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them. (Case C 215/06 *Commission v. Ireland*, [57]).

(vi). There is a line of case law, commencing with Case C 201/02 Wells and including Case C 379/15 *Association France Nature Environnement*, which, on one reading at least, appears to suggest that a national court is required to suspend or revoke a development consent adopted in breach of the obligation to carry out an environmental impact assessment. This is subject to a possible exception where annulment of the contested measure would result in a legal vacuum which would be more harmful to the environment.

(vii). Advocate General Kokott in Case C 196/16 *Comune di Corridonia* emphasised that the rules for the regularisation of projects should allow for the possibility of the suspension of invalid development consents pending the carrying out of a proper environmental impact assessment. The Advocate General returned to this theme in Case C 411/17 *Inter-Environnement Wallonie ASBL*, [200]. (The judgment of the CJEU in that case is scheduled to be delivered next week, Monday, 29 July 2019).

77. The case law referred to above is largely concerned with scenarios where a developer had applied for and obtained a development consent, only for it to be held subsequently by a court that the development consent had been granted in breach of the requirements of the EIA Directive. The CJEU recognises that it is open, in principle, to a Member State to allow for the regularisation of such projects by the carrying out of a lawful assessment *ex post facto*. This is, however, subject to conditions and limitations. In particular, it seems that there must at least be the *possibility* of suspending development works pending the carrying out of a compliant environmental impact assessment.

78. The effect of the transitional provisions under the Ministerial Regulations is more extreme. A period of grace is afforded to developers who had never obtained any development consent. The transitional provisions would allow unlicensed peat extraction to continue for a period in excess of eighteen months. There does not appear to be any provision under domestic law whereby that activity can be suspended during the transitional period. The fact that peat extraction involving an area in excess of 30 hectares is now exempt from the requirement to obtain planning permission has the immediate legal consequence that the enforcement mechanisms provided for under the PDA 2000 are inapplicable. A legislative regime which allows unlicensed activities to continue unabated would appear *prima facie* to breach the requirements of the EIA Directive, and, in particular article 2 and article 10A thereof.

Decision

79. The Ministerial Regulations involve the disapplication of *existing* domestic legislation which appears to be largely in conformity with the requirements of the EIA Directive. Put otherwise, the Ministerial Regulations represent—at least for the duration of the transitional period—a retrograde step in that, for a period of in excess of eighteen months, the domestic legal regime will be less effective than that which had come before.

80. It is long since established that where a Member State exceeds its discretion by exempting projects from assessment under the EIA Directive where required, then the domestic law provisions must be set aside. It is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment, and, if so, to ensure that they are subject to an impact assessment. See Case C 72/95 *Kraaijeveld*, [61].

81. In order to defend the proceedings at full hearing, the State respondents will have to persuade the trial judge that it is permissible to allow unlicensed peat extraction to continue on a *temporary basis* in breach of the EIA Directive. The case law of the CJEU suggests that a temporary derogation from EU environmental law will only ever be allowed where there are overriding considerations linked to environmental protection.

82. More specifically, there is a line of case law, including most recently the judgment of the CJEU in Case C 379/15 *Association France Nature Environnement*, which indicates that a national court may limit in time certain effects of a declaration of the illegality of a provision of national law adopted in disregard of EU environmental law (on the facts, the Strategic Environmental Impact Assessment Directive, 2001/42/EC) where there are overriding considerations linked to environmental protection.

83. Counsel for the State correctly observed at the hearing before me that this line of case law addresses the legal position arising *subsequent* to a finding that domestic legislation is inconsistent with EU law, i.e. the post-judgment position. The case law does not address the legal test applicable to interim or interlocutory measures pending the hearing and determination of proceedings. This line of case law is nevertheless relevant when assessing the strength of the Applicant's case and whether the State respondents have an arguable defence, in accordance with the principles in *Okunade* and *Dowling*.

84. The State respondents have not alleged that the transitional provisions are necessary to avoid harm to the environment. Rather, the most that seems to be said is that same are required to afford developers, who are already in breach of the long-standing requirements of the EIA Directive, a further period of time within which to regularise their position. See paragraph 54 of the written legal submissions as follows.

> "54. Fourth, one of the key rationales for the transitional lead-in period provided for in the Challenged Regulations was to allow the peat companies at issue sufficient time to prepare the necessary licence applications and requisite reports, including where relevant an Environmental Impact Assessment Report, to be appended thereto. In the event that a stay is granted, this may result in such companies suspending their preparations for the licence applications. This may ultimately mean that, in the event that the validity of the Challenged Regulations is upheld, such companies may no longer be in a position to meet the deadline as currently provided therein of July 2020 for licence applications, and may as a result seek to have that deadline put back. Such an outcome would be plainly counterproductive and would result in further delaying matters."

85. It cannot be said, at this interlocutory stage of the proceedings, that the State respondents have disclosed an arguable defence to the grounds of challenge under the EIA Directive. The written legal submissions on the interlocutory injunction application did not

address the merits of the case at all, other than to concede that the Applicant has established an arguable case. The State respondents have not yet filed a substantive affidavit supporting their formal statement of opposition. The content of the anticipated affidavit, when filed, may well increase the prospects of a successful defence of the proceedings. On the basis of the evidence, materials and argument currently available, no insight has been offered by the State respondents as to how they intend to justify the wholesale exemption, albeit for a temporary period, of large scale peat extraction projects from EU Directives which were to have been implemented by June 1988 and May 1994, respectively.

86. None of this is to say that the State respondents might not ultimately succeed at trial. The State respondents might well persuade the court at the full hearing that this temporary disapplication of the obligation to comply with the EIA Directive, several decades after the implementation date, is justified by reference to the "exceptional circumstances" of peat extraction. At this interlocutory stage, however, it is not obvious that there is an arguable defence to this aspect of the proceedings.

87. On one reading of the judgment in *Dowling*, a finding that no arguable defence to the proceedings has yet been disclosed could be dispositive of an application for an interlocutory injunction. However, given the fact that the within proceedings seek to disapply legislative measures (as opposed to restrain the sale of an asset as in Dowling), it seems preferable not to decide the application on this narrow basis. Instead, I propose to adopt the traditional approach of determining the application before me by considering where the greatest risk of injustice would lie in accordance with the principles in *Okunade*. For the purpose of this exercise, "the court can place all due weight on the strength or weakness of the applicant's case".

88. Finally, for the avoidance of any doubt, it should be emphasised that the assessment of the State respondent's defence has been strictly confined to the question of whether the *transitional provisions* under the Ministerial Regulations represent a breach of the EIA Directive and/or the Habitats Directive. None of the other grounds of challenge have been considered. This is because those grounds relate to the *substance* of the proposed licensing regime, and will not come into operation until well after the full hearing in September 2019. See further paragraph 115 below.

WHERE DOES THE GREATEST RISK OF INJUSTICE LIE?

Discussion

89. The case which the Applicant makes is elegant in its simplicity. First, it is said that the transitional provisions represent a "flagrant breach" of the requirement to subject large-scale peat extraction to assessment for the purposes of the EIA Directive, and that there is no arguable defence to this alleged breach. Secondly, it is said that prolonging unauthorised and unassessed peat extraction activities is potentially damaging to the environment and human health. One of the directors of the Applicant, Mr Tony Lowes, in his affidavit of 9 April 2019, has identified four examples of what he describes as "industrial scale" peat extraction which it is alleged would be permitted to continue during the transitional period under the Ministerial Regulations.

90. Mr Lowes has also exhibited, as part of a later affidavit, a letter dated 29 April 2019 from the European Commission.

> "We are aware of this new legislation which was communicated to us by the Irish authorities in January 2019. Whilst we welcome the creation of the new regime which it is hoped will finally bring Ireland's wide ranging peat extraction activities into line with EU law, we share your concerns about the further delay that is now created in the application of Directive 2011/92/EU on environmental impact assessment (EIA). As a result of these concerns we have written formally to the Irish authorities raising these concerns. In particular, we remain concerned about the continued lack of application of the law to peat extraction activities despite last year's national court ruling in the Bulrush and Westland case. Furthermore, the judgment of the Court of Justice against Ireland in Case C 392/96, in September 1999 concerning the failure by Ireland to correctly transpose the original EIA Directive 85/337/EEC with regard to peat extraction activities was closed in December 2005 after the adoption of the Planning and Development Regulations 2005 (SI 364 of 2005) and the subsequent completion of designations of the Natural Heritage Areas to protect peat bog sites. It appears that the new legislation now deletes that legislation leaving a legal limbo until this new regime starts to apply."

91. The State respondents have chosen not to engage in detail with these factual allegations at the interlocutory stage of the proceedings. (As noted, no substantive affidavit has yet been filed on behalf of the State respondents in support of their statement of opposition).

92. The State respondents rely instead on a number of factors which they say militate against the grant of an interlocutory injunction. The principal of these is that an interlocutory injunction would have the effect of suspending legislation which is presumed to be valid.

93. Counsel for the State submitted that a heavy burden lies on the Applicant to demonstrate why domestic legislation should not be enforced. Reliance was placed in particular on the judgment in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576, [94] where the Chief Justice cited with apparent approval the following passage from Brealey and Hoskins, *Remedies in EC Law* (2nd ed., Sweet and Maxwell, 1998).

> "In weighing the balance of convenience, the court will have regard to the nature of the law sought to be disapplied: whether it is firmly embedded in the domestic legal order; whether it is secondary or primary legislation; and the category or numbers of persons it effects. In determining where the risk of injustice lies, the courts must have regard to the wider considerations of the public interest … In this context, Lord Goff stated in *The Queen v. Secretary of State for Transport, ex parte:Factortame Ltd and Others* (Case C 213/89) [1990] E.C.R. I-2433; [1991] 1 A.C. 603:-
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> > '…particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law.' "

94. Particular reliance was also placed on the judgment of the High Court (Clarke J.) in *M.D. (An Infant) v. Ireland* [2009] IEHC 206; [2009] 3 I.R. 690 ("relevant jurisdiction is one which must be most sparingly exercised"), and that of the High Court (Peart J.) in *Garda Representative Association v. Minister for Public Expenditure and Reform* [2014] IEHC 237 ("barring some truly exceptional circumstances in an individual and exceptional case, the balance of convenience must lie against prohibiting the operation of

measures which are *prima facie* lawful pending a determination of the issues arising").

95. The force of this argument is weakened somewhat by the fact that the legislation impugned in these proceedings, i.e. the Ministerial Regulations, is secondary legislation only. Such legislation does not benefit from the presumption of constitutionality. (The judgment in *Garda Representative Association v. Minister for Public Expenditure and Reform* had also concerned *secondary* legislation, but it does not appear from the judgment that any argument had been made to the court to the effect that anything turned on the distinction between primary and secondary legislation).

96. Nevertheless, I fully accept that—even in the case of secondary legislation—the jurisdiction to suspend the operation of a legislative measure is one which must be "most sparingly exercised". There must, in the words of Clarke J. in *M.D. (An Infant) v. Ireland* (cited above), be "significant countervailing factors" identified before such interlocutory relief could be granted.

> "While, in general terms, the principles applicable to the grant or refusal of an interlocutory injunction in a case such as this are no different from those which apply in the case of any other interlocutory injunction, it has to be emphasised that a very significant weight indeed needs to the attached, in considering the balance of convenience, to the desirability that legislation once coming into force should be applied unless and until such legislation is found to be invalid having regard to the Constitution. It should only be where significant countervailing factors can be identified or where it is possible to put in place measures which would minimise the extent to which there would be any interference with the proper and orderly implementation of the legislation concerned, that a court should be prepared to grant an injunction which would have the effect of preventing legislation which is *prima facie* valid from being enforced in the ordinary way."

97. The fact that the interlocutory injunction sought in the present case would suspend the operation of legislation, albeit secondary legislation, is something which must give pause to the court. For reasons elaborated upon under the next heading below, I am satisfied that (i) the apparent absence, at this interlocutory stage, of any arguable defence to the that aspect of the proceedings concerning the temporary disapplication of the EIA Directive and the Habitats Directive; (ii) the especially serious nature of the breach of EU law alleged; and (iii) the risk of harm to the environment, represent "significant countervailing factors" when all three are taken together.

98. The second factor relied upon by the State respondents in opposition to the injunction application involves an allegation that an interlocutory injunction would lead to significant uncertainty. The argument is advanced as follows in the written legal submissions.

> "49. For instance, the effect of the Challenged Legislation is to transfer enforcement powers in relation to peat extraction to the EPA from the planning authorities. Were a stay to be granted, it would seem to have the effect of temporarily reversing this transfer until trial of the main proceedings. However, if this were to occur, it would clearly take time for planning authorities to investigate and, where required, bring enforcement proceedings in cases of suspected infringement. Such proceedings would be unlikely to have concluded prior to the hearing and determination of the main proceedings in the present case.
>
> 50. Similarly, it is unlikely that any third-party enforcement proceedings pursuant to Section 160 PDA 2000 would have concluded prior to the hearing and determination of the present proceedings. In the event that the validity of the Challenged Legislation were upheld, this would mean that any such enforcement proceedings brought in the interim would fall away, which would result in significant legal uncertainty and may, one might reasonably imagine, deter regulators from progressing enforcement action pending clarification of the legal situation.
>
> 51. Conversely, it is clear that the EPA would be prevented from progressing its enforcement activity conferred by the Challenged Legislation as it would no longer enjoy a legal basis for doing so.
>
> 52. It is therefore submitted that, were the Applicant to be granted the relief sought in their Notice of Motion, this would simply exacerbate rather than reduce legal uncertainty, and would not assist enforcement during this interim period.
>
> 53. Third, it follows that placing a stay on the Challenged Legislation may not in practice stop unlawful excavation, and accordingly is unlikely to achieve the Applicant's cited aims in justification of the present application for a stay."

99. With respect, there are a number of difficulties with this line of argument. First, it overlooks the fact that the EPA's statutory powers of enforcement will not apply to peat extraction that involves an area of 30 hectares or more during the transitional period. There is no seamless transfer of enforcement powers from the planning authorities to the EPA. It is precisely because there is to be a lacuna in enforcement for a period in excess of eighteen months that the Applicant makes complaint.

100. Second, the argument implicitly invites the court to assume that—in the event of an interlocutory injunction being granted—the planning authorities will not comply with their statutory obligations under Part VIII of the PDA 2000 to take enforcement action. The relevant legislative provisions have been summarised earlier at paragraph 45. As appears, a planning authority is under a statutory obligation to take enforcement action in certain circumstances, as set out at section 153(7) of the PDA 2000. There is a presumption that public authorities will act lawfully, and thus the concerns expressed by the State respondents do not seem to be well founded.

101. Moreover, the maintenance of the *status quo ante* would at least allow for the *possibility* of enforcement action during the transitional period in that the regulatory framework under the PDA 2000 would continue to apply to peat extraction. The effect of the Ministerial Regulations, conversely, is to set that aside notwithstanding that the enforcement regime under the Environmental Protection Agency Act 1992 will not be triggered for a considerable period of time. The disapplication of *existing* enforcement mechanisms is difficult to reconcile with the express obligation on a Member State, pursuant to article 10A of the EIA Directive, to provide effective, proportionate and dissuasive penalties.

102. The next factor relied upon by the State respondents is that—in the event that an interlocutory injunction were to be granted—developers would suspend preparations for the making of licence applications and this would defeat the very purpose of the transitional period. With respect, the more obvious reaction of developers to an interlocutory injunction, which results in their being amenable to enforcement action, would be to expedite the preparation of licence applications in an attempt to regularise the status of their peat extraction activity. At all events, an argument which is solicitous for the position of developers who are continuing to carrying on what is, under the pre-January 2019 legislative regime, *unauthorised* development is not an attractive argument. It is also inconsistent with the legislative amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 (discussed at paragraph 32 above).

Decision

103. For the reasons set out below, I have come to the conclusion that the greatest risk of injustice lies in *refusing* to grant an interlocutory injunction. As explained presently, however, I propose to limit the terms of the injunction.

104. First, the grounds of challenge which are predicated upon an alleged breach of the EIA Directive and the Habitats Directive would appear to be very strong. The Ministerial Regulations purport to exempt, *with immediate effect*, large scale peat extraction projects from existing provisions of domestic legislation which implement the EIA Directive and the Habitats Directive. However, the replacement development consent procedure will not be fully in force for a significant period of time thereafter. The practical effect of this is that certain peat extraction activities—which require to be assessed for the purposes of the EIA Directive and might need to be assessed for the purposes of the Habitats Directive—may continue for a period of in excess of eighteen months without there being any obligation under *domestic law* to hold a development consent. Unlicensed peat extraction may thus be carried out without there being any risk of enforcement action. This appears *prima facie* to represent a breach of (i) the EIA Directive, and, in particular, article 2 and article 10A thereof, and (ii) article 6(3) of the Habitats Directive. In this regard, I have attached some weight to the concerns raised by the EU Commission in its letter of 29 April 2019 (set out at paragraph 90 above).

105. Secondly, the breach of EU environmental law alleged by the Applicant would—if well founded—represent an especially serious breach of the Irish State's obligations as a Member State of the European Union. On the Applicant's case, the Ministerial Regulations involve a retrograde step whereby *existing* domestic legislation, which properly transposes the EIA Directive and the Habitats Directive, is to be disapplied in the case of peat extraction. This will have the legal consequence that—during the transitional period—the Irish State's transposition of the EU environmental legislation will be less effective than that which had gone before.

106. Thirdly, if it were to transpire that the Applicant's complaints are well founded, then the refusal to grant an interlocutory injunction would have had the effect that unlicensed peat extraction would have been allowed to continue during the summer harvesting period in breach of the EIA Directive and the Habitats Directive. The absence of a requirement to obtain any development consent during this period could, in at least some instances, create a risk of harm to the environment. There are no conditions attached to unlicensed peat extraction.

107. In this regard, it should be recalled that part of the purpose of the EIA Directive is to identify suitable conditions and mitigation measures to be attached to development consents. The matter is put as follows by the Advocate General in Case C 261/18 *Commission v. Ireland (Derrybrien wind farm).*

> "30. Directive 85/337 requires the Member States to adopt the necessary measures to ensure that an environmental impact assessment is carried out in accordance with principles harmonised at EU level for projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location. The main purpose of this assessment is to gather the information necessary to enable the competent authorities of the Member States to identify, during the development consent procedure for such projects, the environmental aspects liable to be adversely affected and thus make an informed decision on whether to grant or refuse the relevant planning consents.
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> 31. The logic underlying Directive 85/337 is undoubtedly the prevention of environmental damage, and, as part of that logic, the obligation to carry out a prior assessment of the environmental effects of a project is justified by the fact that, at a decision-making level, it is necessary for the competent authorities to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, with a view to preventing 'the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'. However, it is also apparent from the text of the directive that the environmental impact assessment is also intended to enable the competent authorities of the Member States, in the event of development consent being granted, to make the consent subject to compliance with conditions that reduce the adverse effects of the project on the environment and, more generally, to take measures to ensure that the resulting structure is used in accordance with criteria of sound environmental management."
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> *Footnotes omitted.

108. The affidavit evidence adduced on behalf of the Applicant suggests that the continued operation of unlicensed peat extraction creates a risk of harm to the environment. The State respondents have chosen, for the moment at least, not to engage with this issue.

109. The limitations on the ability of a court hearing an application for interim measures to reach findings of fact in respect of alleged harm to the environment have been adverted to by the CJEU in Case C 441/17 R *Commission v. Poland (Bia³owie¿a Forest),* albeit in the specific context of infringement proceedings against a Member State. The CJEU suggested that a court hearing an application for interim relief cannot make findings of fact but should postulate, solely for the purpose of the assessment of the existence of serious and irreparable damage, that the complaints put forward in the main proceedings by the applicant for interim measures *might* be upheld. This approach seems appropriate in circumstances, such as those in the present case, where the respondent has declined to engage with the allegations of environmental harm.

110. The risk of harm to the environment is, self-evidently, a weighty factor to be considered in the balance in deciding whether or not to grant an interlocutory injunction. I am not satisfied that the State respondents have, as yet, been able to point to any countervailing factor which might legitimately be weighed against this risk.

Alleged delay

111. For the sake of completeness, I should say that I have also concluded that the State respondents' allegation of delay on the part of the Applicant is unfounded. The Ministerial Regulations did not become operative until 25 January 2019. The within judicial review proceedings were instituted on 12 April 2019, i.e. within the three-month period prescribed under Order 84, rule 21 of the Rules of the Superior Courts (as amended in 2011). The motion seeking an interlocutory injunction was issued on 15 May 2019. The timescales involved are reasonable having regard to the need to put forward evidence as to the potential impact of the Ministerial Regulations on the environment.

112. The State respondents have not been prejudiced by the alleged delay. In particular, the State respondents were afforded a reasonable period of time to prepare for the hearing of the interlocutory injunction application on 15 July 2019, and to file such affidavits and written legal submissions as they thought fit.

113. In reaching this finding, I have had regard to the principles set out by the Supreme Court in respect of delay in its judgment in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576, [46].

> "The delay jurisprudence sought to be relied on by the Minister applies in exactly the same way in respect of any comparable domestic application for an interlocutory injunction and there is, therefore, no question of the breach of the principle of equivalence. As will again be explored in more detail, the principle of effectiveness requires that national procedural law cannot make the achievement of a European Union law mandated remedy 'practically impossible or excessively difficult'. But it is clear that Irish law does not impose impossible obligations on parties who seek interlocutory injunctions. If, in all the circumstances, a party has not been guilty of unreasonable delay then, even if the application is brought late, with all of the consequences which the court has sought to analyse, nonetheless the court will have to do the best it can in those difficult circumstances for, as a matter of Irish law, a party could not be deprived of an opportunity to seek an interlocutory injunction on the grounds of delay where, in all the circumstances, it could not be said that the party was materially culpable."

114. It seems to me that some weight must be given to the fact that the principal grounds of challenge arise out of an alleged breach of EU environmental legislation.

PROPOSED ORDER

115. The terms in respect of which an interlocutory injunction has been sought are overbroad. The *urgency* in this case arises from the fact that peat extraction that involves an area in excess of 30 hectares has been exempted from the requirement to obtain planning permission, with the concomitant loss of the enforcement mechanisms otherwise available under the planning legislation. The terms of the order sought, however, go much further than this, and seek to restrain the implementation of the proposed new licensing regime in respect of peat extraction. The paradox in the Applicant's application for an interlocutory injunction is that the urgency arises precisely because the provisions of the new licensing regime will *not* come into full force and effect for a period of in excess of eighteen months in the case of unlicensed activities, and a period of thirty-six months in the case of licensed activities. The judicial review proceedings will have been heard and determined—at the level of the High Court at least—well before these time periods have expired. It is difficult to understand, therefore, why an order restraining the implementation of new licensing regime is necessary.

116. Accordingly, I propose to confine the interlocutory injunction to one restraining the implementation of the Planning and Development (Exempted Development) Regulations 2019. This will ensure that the *status quo ante*, whereby unauthorised peat extraction is amenable to enforcement measures under the PDA 2000, is maintained.

117. I am acutely conscious of the fact that even this limited form of order involves the exercise of an exceptional jurisdiction on the part of the High Court in that it suspends the operation of (secondary) legislation. This is not something to be done lightly, for all of the reasons set out in the case law cited at paragraph 93 *et seq*. above. It would be undesirable if such an interlocutory injunction were to remain in place for a lengthy period of time. I propose, therefore, to list these proceedings for full hearing in the first week of September. To this end, I will hear counsel on an appropriate timetable for the exchange of affidavits and written legal submissions.

118. I have given serious consideration as to whether the availability of an early trial date might obviate the need for any interlocutory injunction. I have concluded, however, that an injunction is required in circumstances where it is common case that peat extraction occurs most intensively over the summer period. The risk of harm to the environment, which the injunction is intended to avoid, is at its greatest during this period.

CONCLUSION

119. A summary of the principal findings and conclusions has already been provided at the start of this judgment, and will not be repeated here. For the reasons set out, I propose to make an order granting an interlocutory injunction restraining the implementation of the Planning and Development (Exempted Development) Regulations 2019. I will hear counsel as to the precise form of wording required in this regard.

120. I propose to list these proceedings for full hearing in the first week of September. To this end, I will hear counsel on an appropriate timetable for the exchange of affidavits and written legal submissions.